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No. 89-46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA M. WOOD, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

REPLY BRIEF FOR PETITIONERS

Arthur H. Bryant
(Counsel of Record)
Trial Lawyers for Public Justice, P.C.
1625 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20036
(202) 797-8600

Alan B. Morrison
Public Citizen Litigation Group
2000 P St., N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Edmund P.Daley
Moquin & Daley
388 Commonwealth Ave.
Boston, MA 02215
(617) 536-0606

Attorneys for Petitioners

Balmar Legal Publishing Division Washington, D.C. 20005 (202) 659-3610

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INTRODUCTION

Instead of attempting to explain why this Court should not review the issue presented by the decision below, General Motors steadfastly insists that it does not exist. According to GM, "the First Circuit's decision did not turn on the issue that petitioner complains about." GM's Brief at 23. Similarly, despite the stark conflict between the First Circuit's decision and the cases discussed in our opening petition at 9-13, GM maintains that there is "virtual uniformity - perhaps unprecedented uniformity - not conflict, here." GM's Brief at 20. And, instead of attempting to show that the decision below presents no important federal question, GM defends the ruling below based on a new interpretation of the Safety Act, specifically limited to claims involving airbags, that renders 15 U.S.C. 1397(c) and the presumption against preemption meaningless. Fatally flawed, GM's new interpretation simply fails to explain what section 1397(c) means, if it does not mean that Congress intended to preserve all common law claims.

By refusing to defend the actual holding of the First Circuit's decision, GM only underscores the need for review by this Court. We address GM's three arguments briefly below.

1. The First Circuit's Decision.

GM's first argument is that we simply have it wrong — "the First Circuit's view of the state of design-defect litigation in 1966 was not the basis for its resolution of the preemption issue." *Id.* at 24. According to GM, "The First Circuit held that federal law preempts petitioner's common-law claim that a 1976 vehicle is defective because it was equipped with one restraint system granted by federal law, seat belts, not a different system, airbags." *Id.* at 1. In its attempt to explain the First Circuit's reasoning, GM stresses 15 U.S.C. § 1410b and the various "options" granted by Federal Motor Vehicle Safety Standard 208. *Id.* at 11-15.

In fact, however, 15 U.S.C. § 1410b and the "options" granted by Standard 208 are utterly irrelevant to the holding of the majority below. The majority's lengthy opinion mentions § 1410b once, Pet. App. 8a, and Standard 208's "options" only three times. Pet. App. 9a-10a, 29a, 32a. More importantly, it does not rely on either in explaining why 15 U.S.C. § 1397(c) fails to preserve petitioners' claims.

Rather, as the United States noted in its *amicus curiae* brief at 23 n.13 in *Ritt v. General Motors Corp.*, No. 88-1822 (7th Cir.), "The *Wood* court held that while § 1397(c) is applicable to tort actions based on manufacturing defects, it should not be applied to authorize actions based on design defects, on the theory that Congress would not have foreseen the development of such actions against automobile manufacturers." As the United States contended in *Ritt* and we demonstrated in our opening petition, that holding is

indefensible. Apparently, GM agrees. Instead of attempting to defend it, GM pretends that it does not exist.

2. The First Circuit's Decision Conflicts With Decisions of Other Federal Circuits and State Courts of Last Resort.

Relying on its mischaracterization of the First Circuit's decision, GM next contends that there is no conflict with other federal courts of appeals and state courts of last resort. As we demonstrated in our petition at 9-13, however, this is not so. The decision below starkly conflicts with the decisions of eight other federal circuits and the highest courts of five states.

GM argues that those cases are distinguishable on a variety of grounds - - they did not involve airbags, or Standard 208, or 15 U.S.C. § 1410b, or an equipment requirement that NHTSA specifically rejected, etc. *See* GM's Brief at 20. All of these factors, however, are irrelevant to the First Circuit's reasoning. The decision below turned on the conclusion that 15 U.S.C. § 1397(c) was not intended to preserve design defect claims - - a conclusion with which the federal circuits and state courts that we cited plainly disagree.

GM argues that eight of these cases "do not concern preemption at all" and "merely hold that compliance with federal safety standards is relevant (not conclusive) to show that an automobile is not defective as a matter of state law." GM's Brief at 21. A review of the cases, however, proves otherwise. To cite but one example, in *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985)(citations deleted), the Fifth Circuit stated, "Of course, compliance with such minimum safety standards does not exempt or immunize a manufacturer from common law strict liability. Certainly Congress did not intend such a result." It then quoted § 1397(c).

Equally incorrect is GM's assertion that the other five cases we cited did not involve "claims based on standards inconsistent with an FMVSS," GM's Brief at 22 — *i.e.*, claims that would require the manufacturer to do more than an applicable FMVSS requires in order to avoid liability. Again to provide but one example, in *Dawson v. Chrysler Corporation*, 630 F.2d 950, 954 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981), the plaintiff alleged that the car was defectively designed "because it did not have a full, continuous steel frame extending through the door panels, and a cross-member running through the floor board between the posts located between the front and rear doors." The jury agreed, despite Chrysler's compliance with Standard 214, which specified the requirements for crush resistance levels in side doors of passenger cars and did not require a design of the kind suggested by the plaintiff. *See* 49 C.F.R. § 571.214. Citing 15 U.S.C. § 1397(c), the Third Circuit affirmed, holding that compliance with FMVSS 214 and other relevant safety standards "does not relieve Chrysler of liability." *Dawson*, *supra* at 958.

GM also argues that there is no conflict because this case involves airbags, just like *Wickstrom v. Maplewood Toyota, Inc.*, 416 N.W. 2d 838 (Minn App. 1987), *cert. denied*, __U.S. __, 108 S. Ct. 2905 (1988), which this Court declined to review last year. According to GM, all cases involving airbags agree with the majority's decision: "there is virtual uniformity - perhaps unprecedented uniformity - not conflict here." GM's Brief at 20.

In fact, however, while it is true that both *Wickstrom* and this case involve injuries caused by the absence of passive restraints, the issues presented by the decisions in the two cases are very different. The rationale of *Wickstrom* was limited solely to airbags. *See id.* The rationale of the court below is not; it applies equally to all design defect claims.

Moreover, when this Court declined to hear *Wickstrom*, the United States had yet to take a position. Now, the United States has taken a position — both the decision below and *Wickstrom* are wrong — a fact which GM utterly fails to address.[1]

Even more disturbing is GM's representation that the preemption rulings in passive restraint cases all agree with the decision below. GM knows that these rulings are anything but uniform. A plethora of such cases find no preemption.[2] And even cases finding preemption of airbag claims conflict with the decision below. *See, e.g., Taylor v. General Motors Corp.*, 875 F.2d 816, 825 (11th Cir. 1989) (rejecting *Wood*). Indeed, in the past few months, several cases and

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[1] The United States explicitly rejects both *Wood* and *Wickstrom*, as well as the interpretation of the Safety Act advanced by GM. *See* Brief of United States as Amicus Curiae at 23 n.13, 20 n.10, and 16 in *Ritt v. General Motors Corp.* No. 88-1822 (7th Cir.). The United States maintains that "to the extent that plaintiff's complaint can be read as based on a theory that the manufacturer had a duty to provide some form of passive protection — and not necessarily airbags — then it would *not*, in our view, be preempted." *Id.* at 17 (emphasis in original). That, of course, is precisely the theory advanced in this case.

[2] Cases involving passive restraints and finding no preemption include *Murphy v. Nissan Motor Corp.*, 650 F.Supp. 922 (E.D.N.Y. 1987); *Fischer v. Chrysler Corp.*, No. 85-699-T (D.Mass. Feb. 9, 1987); *Burge v. Blight*, No. 41-75-75 (Cal. Super. Ct. June 30, 1987); *Barfels v. Holman Imports, Inc.*, No. 85-1901-CB (Fla. Cir. Ct. Aug. 20, 1986); *Lynch v. Mims*, No. GCG 85-0019 (Fla. Cir. Ct. Aug. 20, 1985); *Morgan v. Noble*, No. 85-CI-309 (Ky. Cir. Ct. Feb. 17, 1985); *Russell v. Johnson*, No. 83-3931 CA-WJN (Fla. Cir. Ct. July 17, 1987); *Seemann v. General Motors Corp.*, No. 86-6145 (CL) "AI" (Fla. Cir. Ct. March 7, 1989); *Kimbrel v. Jones*, No. 85V-009 (Ga. Super. Ct. Nov. 19, 1987), *rev'd on other grounds sub nom. Honda Motor Co. v. Kimbrel*, No. 76473 (Ga. Ct. App. Nov. 7, 1988); *Schaeffer v. Chrysler Motor Corp.*, No. 88-L-47 (Ill. Cir. Ct. May 12, 1989); *Bateman v. Ford Motor Co.*, Civ. No. GD 84-4994 (Pa. Ct. C.P. June 18, 1987); *Dever v. Langthorp*, No. 85-53541 (Tex. Dist. Ct. Apr. 29, 1989); *Munson v. Pearcy*, No. B-840, 570 (Tex. Dist. Ct. May

commentators have severely criticized the decision below. *See, e.g., Schwartz v. Volvo North America Corporation*, __So.2d __, slip op. at 19-21, 29-36 (Ala. July 28, 1989) (Hornsby, C.J., concurring in part and dissenting in part); Fabian, "Federal Preemption: Car-Makers Cushion Against Air Bag Claims?", 27 *Duq. L. Rev.* 299, 318-322 (1989).[3] The plain conflict requires review.

3. The First Circuit's Decision Presents An Important Federal Question.

GM does not argue that this case fails to present an important federal question. Nor does it contend that section 1397(c) is inapplicable to design defect claims, as the majority below held. Instead, it asserts that design defect claims involving passive restraints are impliedly preempted, while other design defect claims are not. This unique defense of the ruling below further underscores the need for review.

Moreover, GM's "passive restraint only" implied preemption argument is wrong. The "sole task" of preemption analysis "is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1988). There is, furthermore, a strong presump-

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16, 1986); *Rasco v. Nissan Motor Corp.*, No. 86 C2148 (Tex. Dist. Ct. Jan. 26, 1989); *Salinas v. Yarborough*, No. 95-6068-B (Tex. Dist. Ct. Oct. 13, 1987); and *Steenbergen v. Ford Motor Co.*, No. 85-15718-C (Tex. Dist. Ct. June 30, 1986). *See also Garrett v. Ford Motor Co.*, 684 F.Supp. 407 (D.Md. 1987). In addition, of course, the district court and dissent below and the district court in *Richart v. Ford Motor Co.*, 681 F. Supp. 1462 (D.N.M. 1988), *rev'd sub nom. Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. petition pending*, No. 89-279, found no preemption. As noted, the plaintiffs in *Kitts* have just petitioned this Court for review of that decision.

[3] For the Court's convenience, copies of these two authorities have been lodged with the Clerk.

tion against preemption: "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the *clear* and *manifest* purpose of Congress," *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)(emphasis added), particularly where, as here, a finding of preemption would leave the injured victims without a remedy. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984); *United States Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 663-64 (1954).

Under these well-established rules of law, there is no basis for a finding of implied preemption in this case. *Accord*, *Schwartz*, *supra* at 19-21; Fabian, *supra* at 305. Here, Congress expressly stated its intent not to preempt: "Compliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* liability under common." 15 U.S.C. § 1397(c)(emphasis added). Once one agrees that Congress intended this language to apply to design defect litigation, (which the majority below refused to do, but GM essentially does here), that is the end of the matter; design defect claims are not preempted - - regardless of whether they concern passive restraints. *See, e.g., Schwartz, supra*, slip op. at 17 ("In my opinion, the analysis should end here.").

GM's response is that a "general savings clause" does not preserve common law claims that "contradict and subvert a statutory scheme." GM's Brief at 26. But § 1397(c) is not a "general savings clause." It is broad, to be sure, but it could not be much more specific. Indeed, the House Committee Report states that § 1397(c) is intended to ensure "that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability." H.R. Rep. No. 1776, 89th Cong. 2d Sess. 24 (1966).

In addition, the cases cited by GM do not support its proposition. *See, e.g., International Paper Co. v. Oullette*, 479 U.S. 481, 107 S. Ct. 805, 812 (1987) (savings clause does not apply to type of common law claims involved because "the Act does not speak directly to the issue"). Equally important, as we explained in our petition at 17-19, petitioners' claims do not contradict or subvert the statutory scheme; they wholeheartedly advance it. GM's interpretation, on the other hand, renders section 1397(c) meaningless.

Moreover, if 15 U.S.C. § 1397(c) leaves any doubt as to Congress' intent, surely the presumption against preemption precludes a finding of implied preemption here. GM barely mentions this presumption, giving it passing reference in a footnote and quoting cases that in no way diminish its force. GM's Brief at 25 n.19.

Instead, GM offers three reasons why design defect claims involving airbags, unlike all other design defect claims, are supposedly impliedly preempted: (1) 15 U.S.C. § 1410b, (2) FMVSS 208 provides "options" for compliance, and (3) FMVSS 208 "has elements of a design standard" because it sets "detailed design requirements with respect to seat belt restraint systems." GM's Brief at 15. None of these reasons supports GM's argument.

First, 15 U.S.C. § 1410b has no preemptive effect because it (a) does not say anything about preemption or common law claims, (b) only applies to Federal Motor Vehicle Safety Standards, and (c) is no longer valid law. Section 1410b says that federal standards requiring passive restraints cannot be issued unless they are submitted for a legislative veto. In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), this Court declared the legislative veto unconstitutional. Similarly, 15 U.S.C. § 1410(b)(3)(C) explicitly provides that the legislative veto will no longer be applicable to federal standards requiring pas-

sive restraints if one such standard is submitted to Congress and is not vetoed. That is precisely what happened in 1977, when the Senate Committee with jurisdiction over NHTSA affirmatively endorsed such a standard. *See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 37 n.7 (1983).

Second, all federal motor vehicle safety standards permit design choices — *i.e.* "options". Some do so explicitly, some do so implicitly. *See* 49 C.F.R. § 571.101 *et seq.* None, however, including Standard 208, has ever offered the option of using a particular design and thereby obtaining immunity from tort liability — in part because NHTSA does not have the power to offer such an option. *See* 15 U.S.C. § 1397(c).[4] Moreover, nothing that Congress ever said suggests that it intended the preemptive effect of a safety standard to turn on whether a standard explicitly or implicitly permits design claims. Followed to its logical conclusion, GM's argument would mean that, if Standard 208 had only said that manufacturers could install seatbelts, petitioners' claims would *not* be preempted, but that, since Standard 208 explicitly states that manufacturers can also put in airbags, petitioners' claims *are* preempted. That makes no sense. In contrast, section 1397(c)'s preservation of tort liability serves the Safety Act's purpose by encouraging the manufacturers to choose the option that saves the most lives.

Third, while it is true that Standard 208 sets forth detailed design requirements with respect to seat belts, that in no way makes it unique. *See* 49 C.F.R. § 571.101 *et seq.*

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[4] If NHTSA had proposed to grant the manufacturers immunity from tort liability through Standard 208, consumers would have received notice and an opportunity to comment. The administrative law challenge to Standard 208 would also probably have come out far differently. *See, e.g., South Carolina Pub. Serv. Auth. v. Federal Energy Regulatory Comm'n*, 850 F.2d 788 (D.C. Cir. 1988) (FERC has no power to displace or replace state tort remedies).

(Federal Motor Vehicle Safety Standards). Nor does it in any way enhance Standard 208's preemptive effect. Regardless of how detailed Standard 208 is, the manufacturers are free to comply with it by installing seatbelts, automatic seatbelts, airbags, some other form of passive restraint, or any combination thereof. Section 1397(c) provides, however, that, whatever they do, they are not immune from liability in tort because they complied with Standard 208. The majority below's refusal to follow those clear and unequivocal words requires that this Court grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Arthur H. Bryant
(Counsel of Record)
Trial Lawyers for Public Justice, P.C.
1625 Massachusetts Ave., NW,
Suite 100
Washington, D.C. 20036
(202) 797-8600

Alan B. Morrison
Public Citizen Litigation Group
2000 P St., N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Edmund P.Daley
Moquin & Daley
388 Commonwealth Ave.
Boston, MA 02215
(617) 536-0606

Attorneys for Petitioners

September 15, 1989